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# Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights

John W. Fisher II

*West Virginia University College of Law*, [john.fisher@mail.wvu.edu](mailto:john.fisher@mail.wvu.edu)

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## JOINT TENANCY IN WEST VIRGINIA: A PROGRESSIVE COURT LOOKS AT TRADITIONAL PROPERTY RIGHTS

JOHN W. FISHER, II\*

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It has been over 25 years since Professor Londo H. Brown published his article entitled "Some Aspects of Joint Ownership of Real Property in West Virginia."<sup>1</sup> Professor Brown described the article as an "attempt to shed some light upon some of the consequences of joint ownership of real property in West Virginia other than tax consequences."<sup>2</sup> Since that time a number of important decisions have been made in the subject area by the West Virginia Supreme Court of Appeals. There has also been a complete revision of divorce law, which has had a significant impact on property rights of a husband and wife regardless of the type of tenancy or ownership involved. This article will examine these decisions and developments in personal and real property law.

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\* Professor of Law, West Virginia University College of Law; A.B., 1964, West Virginia University; J.D., 1967, West Virginia University.

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1. Brown, *Some Aspects of Joint Ownership of Real Property in West Virginia*, 63 W. VA. L. REV. 207 (1961).

2. *Id.* at 207-08.

## I. JOINT TENANCY IN REALTY: THE LAST TWENTY FIVE YEARS

Because Professor Brown retraced the evolution of these estates in property from the common law, this discussion will not be repeated. However, in order to provide consistency and avoid confusion as to terminology, the same terms used by Professor Brown will be used herein. The term "joint tenancy with right of survivorship" will be used to describe an estate in West Virginia where "[e]ach joint tenant owns the whole estate subject to the equal rights of ownership of his cotenants. They all own the property as an entity and when one dies those left still own it as an entity."<sup>3</sup> This term is used to distinguish the estate from the common law "joint tenancy" which presumed survivorship. Professor Brown explained, "A West Virginia statute provides that when any joint tenant of an interest in property dies, his interest therein shall descend or be disposed of as if he had been a tenant in common."<sup>4</sup> This statute shall not apply, however, "when it manifestly appears from the tenor of the instrument which created the tenancy that . . . the interest of the one dying should then belong to the others."<sup>5</sup>

While empirical data is not available, it is believed that most conveyances of family residences to husband and wife are made as joint tenancies with the right of survivorship. Professor Brown began his article with a similar observation: "A very large percentage of the conveyances of real estate to be used as the residences of the grantees are made to husbands and wives, and most of these conveyances expressly provide for survivorship between the owners."<sup>6</sup> Apparently, the popularity of such conveyances led the West Virginia Legislature to enact a series of Code provisions presumably designed to simplify the method of creating survivorship between joint tenants.<sup>7</sup> At early common law, a conveyance to two or more individuals created a joint tenancy (i.e., with survivorship presumed)

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3. *Id.* at 208.

4. *Id.*; W. VA. CODE § 36-1-19 (1985).

5. Brown, *supra* note 1, at 208. See also W. VA. CODE § 36-1-20.

6. Brown, *supra* note 1, at 207.

7. W. VA. CODE §§ 36-1-19, -20, -20a (1985).

if the four unities of time, title, interest and possession were present.<sup>8</sup> By the fourteenth century tenancies in common were recognized when one or more of the unities were missing.<sup>9</sup> Thus, a gift to two or more persons of an undivided one-half or other fractional interest created a tenancy in common, not a joint tenancy, because the gift was to them as separate individuals and not to them as a unit. On the other hand, the essence of a joint tenancy was the existence of a single estate in the unit, not separate interests in the individual tenants.<sup>10</sup> The common law rule was, therefore, that a conveyance to two or more individuals was presumed to be a joint tenancy (survivorship) unless the intent was clear that tenancy in common was to be created. Professor Brown referred to this common law presumption of survivorship as a "trap for the unwary."<sup>11</sup> This presumption in favor of joint tenancy has since been modified by statute in most states.<sup>12</sup> West Virginia also has statutorily reversed the common law presumption and has created, in effect, a tenancy in common unless the instrument expresses an intent that survivorship be

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8. In the thirteenth century the only form of co-ownership aside from co-parceny was joint tenancy. Every conveyance of an estate of freehold to two or more persons in fee, in fee tail, or for life created a joint tenancy. The grantees took as though they together constituted one person, a fictitious unity. The historical explanation of this fiction is not clear, but probably arose in some way from the feudal relation. It was to the interest of the lord that each feudal holding be a single feud continuing until the death of the survivor, and this advantage evidently outweighed the disadvantage to the lord in not receiving a relief or wardship [feudal incidents] on the death of a cotenant leaving a survivor or survivors.

2 AMERICAN LAW OF PROPERTY § 6.1, at 3-4 (A. Casner ed. 1952).

9. The later books recite that four unities were essential to a joint tenancy, those of time, title, interest and possession. The requirement of the four unities expresses in an artificial way the basic idea that cotenants hold as a unity with a community of interest between them, since if they take as one they must take at the same time, by the same deed or feoffment, and must have interests which are identical.

*Id.* at 4.

10. *Id.*

11. As the feudal system lost its hold the chancery courts began to hold that a conveyance to two or more persons created a tenancy in common if there was anything in the creating instrument to negative an intent to create a joint tenancy. This was probably because a contrary holding meant the perpetration of a trap for the unwary. It is doubtful if many laymen realize that they are not obtaining an inheritable estate when they are grantees in a deed along with other grantees. If A and B are the grantees in a deed they would probably both believe that they each had an estate which they could devise by will or which would descend to their heirs in case of intestacy.

Brown, *supra* note 1, at 209.

12. 2 AMERICAN LAW OF PROPERTY § 6.3, at 11 (A. Casner ed. 1952).

created.<sup>13</sup> The method of expressing the requisite intent for survivorship in deeds varies from a phrase such as "joint tenants with right of survivorship as provided for by statute" to one constituting a full paragraph.<sup>14</sup>

Historically, if one owned real property as an individual or as a tenant in common and wished to create survivorship, the property would be conveyed to a straw party for the purpose of reconveyance. The deed from the straw party back to the grantees would expressly state that the grantees took as joint tenants with the right of survivorship. The reconveyance by the straw party not only contained

13. *DeLong v. Farmers Bldg. & Loan Ass'n.*, 148 W. Va. 625, 137 S.E.2d 11 (1964). Until § 36-1-20 of the West Virginia Code [hereinafter W. VA. CODE] was amended in 1981 the provision read as follows:

When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descend or be disposed of as if he had been a tenant in common.

W. VA. CODE § 36-1-19 (1966).

The preceding section [§ 36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies.

Under the statute, no particular words were necessary to create survivorship. W. VA. CODE § 36-1-20 (1966).

In *DeLong*, Judge Haymond, speaking for the court, explained the effect of such statutes as follows:

It is well established generally that as a result of legislation abrogating the common law doctrine of survivorship as an element of joint tenancy, the common law rule favoring joint tenancy has been superseded and it is now presumed that the tenancy in question is a tenancy in common instead of a joint tenancy unless a contrary intention to create a joint tenancy sufficiently appears. . . . Accordingly, where the instrument is silent or ambiguous as to the nature of the joint estate created, it will be construed as creating a tenancy in common and not a joint tenancy. A construction of an instrument as creating a joint tenancy is to be avoided, but the presumption against a joint tenancy is rebuttable. In order that a joint tenancy may be created, there must be specific language manifesting such intent; but the particular phraseology employed in the instrument creating the estate is immaterial where it plainly appears from the terms of the instrument in its entirety that the intention was to create an estate in joint tenancy.

*DeLong*, 148 W. Va. at 633-34, 137 S.E.2d at 17.

14. It is the intention of this conveyance to vest title to said property in the Grantees jointly and equally and to the survivor of either of them so that upon the death of either the entire interest in said property will immediately vest in the survivor.

WEST VIRGINIA PRACTICE HANDBOOK 20.40 (D. Stern 2d ed. 1977).

the necessary expression of intent under chapter 36, article 1, section 20 of the West Virginia Code (hereinafter W. Va. Code), but it also satisfied the “four unities” requirement of the common law. Because this method required two deeds (i.e., the one from the owner(s) to the straw party and the one from the straw party to the “grantees” with the right of survivorship), the method was apparently deemed unduly cumbersome by some legislators. On March 5, 1974, the West Virginia Legislature adopted W. Va. Code § 48-3-7a, which allowed the creation of survivorship between husband and wife without the use of the straw party conveyance.<sup>15</sup>

While good intentions may have motivated the Legislature when adopting this provision, its method left something to be desired. Although most joint tenancies with the right of survivorship are undoubtedly created in husband and wife, such ownership is not restricted to married couples. If such a statute is needed or desirable, there is no logical policy reason for restricting its application to only one class of grantees (i.e., husband and wife).<sup>16</sup> In 1981, the Legislature “corrected” the deficiencies of § 48-3-7 by repealing the section in its entirety and replacing it with § 36-1-20a.<sup>17</sup> Thus, after the 1981 enactment the application of the statute was no longer restricted to husband and wife transactions. In addition, the provision was moved from Chapter 48, the domestic relations section of the W. Va. Code, to Chapter 36, “Estates in Property.”

At the same time the Legislature enacted W. Va. Code § 36-1-20a, it also amended § 36-1-20 by adding a second paragraph. This

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15. Subject to the provision of section nine (§ 48-3-9) of this article, any conveyance or transfer of property or any interest therein, with a right of survivorship executed by either husband or wife to or in favor of the other, shall be valid to the same extent as a similar transfer or conveyance from a third party to the husband and wife together or by a straw party deed.

W. VA. CODE § 48-3-7a (1980) (repealed 1981).

16. For a thorough discussion see Note, *The Creation of Joint Tenancies—Common Law Technicalities v. The Grantor's Intent*, 82 W. VA. L. REV. 335 (1979).

17. Any conveyance or transfer of property, or any interest therein, creating a joint tenancy with right of survivorship together with the person or persons conveying or transferring such property, executed by such person or persons to or in favor of another shall be valid to the same extent as a similar transfer or conveyance from a third party or by a straw party deed.

W. VA. CODE § 36-1-20(a) (1985).

paragraph provided that if the disjunctive "or" was used to link multiple names, survivorship was created, unless expressly stated otherwise.<sup>18</sup> It appears that the addition of § 36-1-20(b) was designed to make the creation of joint tenancy with right of survivorship of real and personal property analogous to the creation of survivorship rights in bank deposits.<sup>19</sup> The provisions of this bank deposit section were held in *Lett v. Twentieth Street Bank* to create survivorship between the parties so that the survivor was entitled to the sums on deposit.<sup>20</sup>

The relationship between the statutory modification which created survivorship and the common law's four unities became the focal point of the 1983 decision in *Herring v. Carroll*.<sup>21</sup> In *Herring*, the West Virginia Supreme Court of Appeals was called upon to decide whether a conveyance by one joint tenant "destroyed" the survivorship created in the conveyance to the husband and wife as grantees. The property in question had been conveyed to Mr. and Mrs. Herring as joint tenants with the right of survivorship. When

18. When the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive "or," such ownership shall be held as joint tenants with the right of survivorship, unless expressly stated otherwise.

W. VA. CODE § 36-1-20(b) (1985).

19. See W. VA. CODE § 31A-4-33 (1988) (concerning deposits in trust or in more than one name).

20. *Lett v. Twentieth St. Bank*, 138 W. Va. 759, 77 S.E.2d 813 (1953). At the time of the *Lett* decision, the provision of W. Va. Code § 31A-4-33 was contained in § 31-8-23. In *Lett*, the court said of this statute:

The statute above quoted is clear, unambiguous and needs no construction. The legislative purpose and intent in the enactment of the statute quoted in part above, was to protect banking institutions. In so doing, the statute created certain property rights in all of the depositors named in a savings account.

It is to be observed that the element of survivorship in a joint tenancy in real or personal property, in general, has been abolished by statute, Code, 36-1-19, which provides, in substance, that any interest theretofore belonging to a decedent, whether present, by way of reversion, remainder or other future interest, whether it be in real or personal property, shall be disposed of as if the person owning such interest had been a tenant in common. But Code, 31-8-23 restored the element of survivorship as to joint deposits made in a bank. In this situation, unless there is some other reason for denying the plaintiff recovery, she is entitled to the deposit made by her brother and the accrued interest thereon. Joint tenancy having been restored as to joint bank deposits, the element of survivorship as it existed at common law, is likewise restored as to such deposits.

*Lett*, 138 W. Va. at 762, 77 S.E.2d at 814-15.

21. *Herring v. Carroll*, 300 S.E.2d 629 (W. Va. 1983).

Mrs. Herring conveyed "her right, title and interest" in the property to her son by a previous marriage, the issue presented was whether this conveyance destroyed the survivorship which had existed between Mr. and Mrs. Herring. In a well-reasoned, well-written decision, Justice Miller, speaking for the court, said that W. Va. Code §§ 36-1-19, 20 had not abolished the four unities requirement for joint tenancy, and, therefore, Mr. Herring and Mrs. Herring's son held the property as tenants in common after the conveyance.<sup>22</sup> The appellant in *Herring* had relied in part on the court's decision in *State ex rel Miller v. Sencindiver*.<sup>23</sup> In *Sencindiver* the court had held that a wife who had killed her husband was entitled to sole ownership of realty which had been conveyed to her and her husband as joint tenants with the right of survivorship because survivorship created pursuant to W. Va. Code § 36-1-20 was the result of legislative action and not common law principles. In attempting to build on the *Sencindiver* decision, the appellants argued that the Legislature's modification of the common law had in effect preempted the matter, and, thus, by the enactment of W. Va. Code §§ 36-1-19, 20, the Legislature actually intended to abolish the four unities. In rejecting this argument, the court noted that if the argument were true, there would have been no need for the Legislature to have enacted W. Va. Code § 48-3-7<sup>24</sup> to permit the creation of survivorship without the use of the straw party deed through which the four unities were created.

## II. A CREDITOR'S RIGHTS TO A DEBTOR'S JOINTLY-OWNED PROPERTY: HOW MUCH IS IT WORTH?

Another issue which the court has addressed since publication of Professor Brown's article is the nature of a creditor's right to a

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22. Adhering to the view expressed by the majority of jurisdictions, it is clear that Mrs. Herring's conveyance to her son destroyed the joint tenancy with the right of survivorship in the property with her husband because her conveyance destroyed part of the four essential unities that were needed to support the joint tenancy. After the conveyance, the property was then held by her husband, Mr. Herring, and the appellee as tenants in common.

*Id.* at 634.

23. *State ex rel Miller v. Sencindiver*, 166 W. Va. 355, 275 S.E.2d 10 (1980). See *infra* notes 130-35 and accompanying text.

24. As noted above, W. VA. CODE § 48-3-7 was repealed in 1981 and replaced by § 36-1-20(a).



debtor's property owned in joint tenancy with right of survivorship. The answer evolved through two decisions beginning in 1984 with *Harris v. Crowder*.<sup>25</sup> In *Harris*, the court was asked "for the first time in West Virginia decisional law . . . to determine whether creditors can execute upon a husband's undivided interest in property held jointly with his wife. In [this case] the ineluctable logic of received property law strains in one direction while common humanity and sound public policy strain in the other."<sup>26</sup> The asset the judgment creditor attempted to reach was the family home of the debtor, Crowder, which was owned in joint tenancy with the right of survivorship.<sup>27</sup> After noting that in *Herring* the court had held that a voluntary conveyance by one tenant will destroy the survivorship, the *Harris* court posed the question as "whether a creditor can stand in the shoes of his debtor and do what the debtor could do himself, namely 1) partition the joint tenancy, 2) convert the joint tenancy into a tenancy in common, and 3) destroy the survivorship interest of the other joint tenant."<sup>28</sup>

Following a brief discussion of the evolution of tenancy by the entirety<sup>29</sup> and a discussion of economics undoubtedly of greatest interest to "law school professors and law review editors," the court reached what appears to be a Solomonic solution to the problem by holding that "creditors of one joint tenant may reach that joint tenant's interest and force partition either in kind or by sale, but

25. *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984).

26. *Id.* at 855.

27. A commissioner had determined the plaintiff's lien was eleventh in priority and at the time of the creditor's suit, the Crowders had separated and Mr. Crowder was not living in the residence. The question certified to the court was:

Where Husband and Wife are joint owners of a parcel of land and the only encumbrance against Wife's undivided one-half interest is a recorded deed of trust securing a note signed by she [sic] and Husband, but where there are numerous judgments and tax liens filed against Husband solely, in addition to the deed of trust, should the Circuit Court grant Wife's Motion to Dismiss, where one of Husband's judgment lien creditors files suit seeking a judicial sale of both Husband's and Wife's interest in the said parcel; or, simply put: Can a judgment lien creditor maintain a creditor's action to sell jointly-owned property where his judgment is against only one of the joint property owners.

*Id.* at 856.

28. *Id.* at 858.

29. As to the evolution of tenancy by the entirety, the author of the opinion, Justice Neely, observed that "[i]t all gets terribly complicated and the whole subject provides a field day for law school professors and law review editors." *Id.* at 859.

only if 'the interest of the other person or persons so entitled will not be prejudiced thereby.'"<sup>30</sup> Central to the holding was the court's reliance on the language found in the partition statute and the court's decision in *Consolidated Gas Supply Corp. v. Riley*<sup>31</sup> that there is no absolute right to partition by sale.

Within a year of the *Harris* decision, the issue was back before the courts in *Vincent v. Gustke*.<sup>32</sup> In *Vincent*, as in *Harris*, a judgment creditor sought to satisfy its lien against property owned by the judgment debtor and his wife as joint tenants with right of survivorship.<sup>33</sup> The complaint in *Vincent*, which was drafted before the *Harris* decision, sought only the sale of the judgment debtor's interest in the property. The judgment creditor argued that the *Harris* decision did not preclude a judgment creditor of one spouse from subjecting the jointly-owned family residence to a suit in order to enforce a judgment lien as long as the creditor was not also seeking a partition. The court conceded the validity of this argument by stating as follows:

Our holding in *Harris* was based upon the explicit statutory language in W. Va. Code § 37-4-3 [1957], the partition statute, that allows a court of equity to take into consideration possible prejudice to a joint tenant whenever another tenant seeks partition in kind or by sale. Unfortunately for Dr. Vincent, the language of W. Va. Code § 38-3-9 [1923] does not authorize a court to inquire into the equities of proceedings to enforce judgment liens. There is nothing to prevent a judgment lien's immediate enforcement. A judgment lien creditor of a debtor who

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30. *Id.* at 861 (citing W. VA. CODE § 37-4-3 (1957)).

31. *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978). *Consolidated Gas Supply Corporation*, the owner of eleven-twentieths undivided interest of all the oil and gas underlying three tracts of land, asserted it had an absolute right to partition of the oil and gas by way of a sale. Its complaint alleged that the oil and gas were incapable of being partitioned in kind. After tracing the legislative history of partition and particularly the effect of the 1931 amendment of W. Va. Code § 37-4-3 and the 1939 amendment of W. Va. Code § 37-4-1, the court held there was not an absolute right of partition by sale. The relevant portion of the court's holding is summarized in syllabus point three: "[b]y virtue of W. Va. Code 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interest of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale." *Consolidated Gas*, 161 W. Va. at 713, 247 S.E.2d at 713.

32. *Vincent v. Gustke*, 336 S.E.2d 33 (W. Va. 1985).

33. The judgment creditor and his wife owned two parcels of property with right of survivorship; one was the couple's marital residence, which also contained the husband's medical office and related facilities, and the second was an undeveloped lot some distance from the residence.

owns property in joint tenancy may execute his lien against the debtor's share of the property.<sup>34</sup>

The court did note that the purchaser at the judgment creditor's sale and the remaining joint tenant would hold the property as tenants in common, and if the creditor sought partition, the court would be free to consider the equities discussed in the *Harris* decision before granting partition.<sup>35</sup>

Two *per curiam* decisions since the *Vincent* decision shed little additional insight on the court's efforts to balance the "unrelenting logic of property law" and "common humanity and sound public policy."<sup>36</sup> In *Myers v. Myers*,<sup>37</sup> a suit was filed by a former husband against his former wife to partition two tracts of land they had acquired during their marriage. When the former husband opposed a proposal by his former wife that the two properties be treated as a unit for partition purposes, the trial court rejected the plan and ordered the property sold.<sup>38</sup> In reversing the trial court, the Supreme Court of Appeals relied on *Garlow v. Murphy*<sup>39</sup> and reiterated the test adopted therein that "[a]n ordinary test of *convenience* in partition, under the statute, is, will any interest assigned be materially less in value than the interest undivided? If so, the tract should be sold; if not, it should be partitioned."<sup>40</sup>

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34. *Vincent*, 336 S.E.2d at 35.

35. *Id.*

36. These policy considerations discussed by Justice Neely in *Harris* build on the concern he had expressed in his concurring opinion in *Stillings v. Stillings*, 167 W. Va. 796, 280 S.E.2d 689 (1981). In *Stillings*, the court held that the fact the ex-wife had been granted exclusive use of the jointly-owned property in the divorce action did not deprive her husband of such possessory rights in the property so as to preclude him from bringing an action for partition. The court recognized that the husband was entitled to a hearing to determine whether he could establish as a fact that the interest of one or more parties would be promoted by partition and the interest of the other parties would not be prejudiced, as required by W. Va. Code § 37-4-3. *Stillings*, in effect, clarified *Murredu v. Murredu*, 160 W. Va. 610, 236 S.E.2d 452 (1977), wherein the court stated that "[w]e refuse to impose common law property concepts onto the *Murredu* exclusive possession right." *Stillings*, 167 W. Va. at 800, 280 S.E.2d at 691. Justice Neely's concurring opinion addressed the use of the jointly held property as security for the wife and stressed that the court's decision provides the ex-husband only the opportunity to be heard and *not* a right to partition.

37. *Myers v. Myers*, 342 S.E.2d 294 (W. Va. 1986).

38. The tracts involved 5.2 acres with a house in Cabell County and 800 acres in Mason County. As a unit, partition in kind could be achieved.

39. *Garlow v. Murphy*, 111 W. Va. 611, 163 S.E. 436 (1932).

40. *Myers*, 342 S.E.2d at 297.

In *Koay v. Koay*,<sup>41</sup> a former husband against his former wife again sought a partition of property co-owned by the parties because a commissioner determined that the parcels in question could not be partitioned in kind. Sale was ordered.<sup>42</sup> On appeal, the former wife challenged: 1) the decision that the property should be sold rather than partitioned in kind, and 2) the trial court's refusal to set aside the partition by sale on the grounds of inadequacy of sale price. The Supreme Court of Appeals rejected both grounds of appeal. As to the inadequacy of price, the court said the following:

In view of the fact that a partition sale is a forced sale and in view of the further fact that cases from other jurisdictions indicate that proceeds of less than 50% of the appraised or actual value of the property received at a partition sale is not so gross as to shock the conscience of the court, this Court does not believe that the appellant's assertion has merit or that the amount received at the partition sale was so grossly inadequate as to require the setting aside of the sale.<sup>43</sup>

In the final analysis, the principles enumerated in *Consolidated Gas*<sup>44</sup> continue to be applicable law. While the court has recognized the likelihood of prejudice to the non-debtor spouse in the event of an attempt to partition the jointly-owned family house, the protection falls far short of that envisioned in *Harris*. The present state of the law also leaves unresolved what will happen under the "ineluctable logic of received property law" when the purchaser of the debtor spouse's interest at the judgment creditor's sale, who is precluded from partition, attempts to exercise the common law right of possession with the non-debtor spouse.<sup>45</sup>

### III. JOINT TENANCY OF BANK DEPOSITS: TRYING TO FIT A SQUARE PEG INTO A ROUND HOLE

The problems inherent in joint tenancy relationships become further complicated when the subject matter of the tenancy is an in-

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41. *Koay v. Koay*, 359 S.E.2d 113 (W. Va. 1987).

42. Twenty-one parcels were involved. Under the divorce decree, the former wife was awarded exclusive use and possession of the parties' jointly owned home and adjoining lot. The sale was of the nineteen remaining parcels. *Id.* at 114.

43. *Id.* at 117.

44. *Consolidated Gas*, 161 W. Va. at 782, 247 S.E.2d at 712 (1978).

45. In *Thaxton v. Beard*, 157 W. Va. 381, 201 S.E.2d 298 (1973), the court recognized that "strictly speaking" a cotenant cannot be a trespasser against his cotenant. *Id.* at 389, 201 S.E.2d at 303.

tangible such as a bank deposit. With the acceptance of the Totten trust<sup>46</sup> as an estate planning device and the flexibility and convenience afforded by joint banking accounts, such arrangements have become common. The widespread use of such accounts has in the past presented very practical operational problems for banking institutions (i.e., what was the bank's responsibility/obligation for honoring the request/demands for withdrawals by the non-depository party). In West Virginia, as in most states, the financial institutions' dilemma was resolved by statutory provisions. In 1919, W. Va. Code § 31-8-23 was enacted and authorized the banking institution to honor the withdrawal of sums by the trustee of the "Totten trust" or any of those named as depositors or the survivor of those named on the joint banking accounts.<sup>47</sup>

Although enacted in 1919, it was 1953 before the court considered the legal effects of this statute on the depositor's property rights. In discussing this statute, the Supreme Court of Appeals in *Lett v. Twentieth Street Bank*<sup>48</sup> said, "The statute [31-8-23] . . . is clear, unambiguous and needs no construction. The legislative purpose and intent in the enactment of the statute . . . was to protect banking institutions. In so doing, the statute created certain property rights in all of the depositors named in a savings account."<sup>49</sup> The court concluded that the immediate effect of the statute on the depositor's property was to restore to joint bank deposits the element of survivorship, which had been abolished by W. Va. Code § 36-1-19, so that after the statute's enactment survivorship existed as it had at common law.<sup>50</sup> The court's decision was based upon the unambig-

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46. *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). A "Totten trust" is created by the deposit of money in a bank or other savings institution in the name of the depositor in trust for another person as beneficiary.

47. W. VA. CODE § 31-8-23 (1919) (repealed 1969).

48. *Lett v. Twentieth St. Bank*, 138 W. Va. 759, 77 S.E.2d 813 (1953).

49. *Id.* at 762, 77 S.E.2d at 814.

50. The court's language was that:

Code § 31-8-23 restored the element of survivorship as to joint deposits made in a bank. In this situation, unless there is some other reason for denying the plaintiff recovery, she is entitled to the deposit made by her brother and the accrued interest thereon. Joint tenancy having been restored as to joint bank deposits, the element of survivorship as it existed at common law, is likewise restored as to such deposits.

*Id.* at 762, 77 S.E.2d at 815.

uous language of the statute, and no "question of gift or trust arises in determining the rights of the parties under the contract of the deposits."<sup>51</sup>

A decade after the *Lett* decision, the court in *DeLong v. Farmers Building & Loan Association*<sup>52</sup> again turned its attention to a similar statutory provision designed to "protect" building and loan associations and its effect upon the property rights of the depositors. Upon a quick reading, the statute<sup>53</sup> involved appeared to have the same effect as the statute construed in the *Lett* case. However, upon a careful reading of the two statutes, the court distinguished the banking statute involved in *Lett* from the building and loan association provision it was construing in *DeLong* by noting that the building and loan association statute did not contain the term "joint tenancy" found in the banking statute.<sup>54</sup> While the court did hold in *DeLong* that the statute did not create survivorship, it noted that

joint tenancy in such shares or accounts may, of course, be created in this jurisdiction by contract which indicates clearly the intention of the persons to create such joint tenancy, and the ownership of such persons as between themselves may likewise be established by gift or by a declaration of trust for their benefit.<sup>55</sup>

Thus, under the respective statutes, the court concluded in *DeLong* that, upon the death of one of the depositors, the ownership of the money in a building and loan association account was to be determined on the basis of the source of the money deposited in the account whereas in *Lett* such funds, unless there was reason for denying recovery, belonged to the survivor(s). The court did not

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51. *Id.* at 764, 77 S.E.2d at 816.

52. *DeLong v. Farmers Building & Loan Ass'n.*, 148 W. Va. 625, 137 S.E.2d 11 (1964).

53. W. VA. CODE § 31-6-8 (Repl. Vol. 1988).

54. The court in *DeLong* concluded the opinion as follows:

Paragraph (c), Section 8, Article 6, Chapter 31, Code 1931, as amended, was enacted primarily for the protection of building and loan and federal savings and loan associations in the payment of their accounts to the persons in whose names they are listed or either of them or the survivor and, unlike Section 23, Article 8, Chapter 31, Code 1931, does not create or restore a joint tenancy with the element of survivorship as it existed at common law as to shares or accounts issued by such associations to two or more persons, payable to either or the survivor, and does not affect or establish the property rights of such persons as between themselves.

*DeLong*, 148 W. Va. at 641, 137 S.E.2d at 21.

55. *Id.* at 640, 137 S.E.2d at 20.

examine whether the difference in the results of these two statutes was desirable or beneficial. The court explained that the difference was "one of policy and may not be considered or dealt with by this court and any change with respect to either or both of such statutes if deemed desirable is, of course, a matter for the legislature and not for the courts."<sup>56</sup>

While the construction or application of W. Va. Code § 31-6-8 has not resulted in further litigation, the provision concerning joint bank deposits has been the source of considerable litigation. In contrast with the earlier cases which dealt with the ownership of the funds upon the death of a depositor, the more recent cases often involve the rights of the "co-owners" during their lifetimes.

The first case to reach the court in which it became necessary to define the "certain property rights" which the court in *Lett* indicated were created by statute<sup>57</sup> was *Dorsey v. Short*.<sup>58</sup> In *Dorsey* a mother deposited money into a joint savings account in her name and her daughter's name. After the daughter withdrew the money from the account without the knowledge of her mother, the mother sued the daughter and the bank for the return of the money. The court in *Dorsey* concurred with the *Lett* decision in that the controversy could not be determined under the common law rules relating to gifts, but must be resolved under the provision of the statute. The court framed the issue as whether a deposit made by a donor in the manner described in the statute "conclusively creates a joint tenancy property right in the donee or whether there can be a concomitant condition placed on the deposit by which the donor can defeat the donee's property right during the donor's lifetime."<sup>59</sup>

The *Dorsey* court referred to its earlier holding in *Lett* and said that *Lett* "made it clear that in the absence of 'some other reason for denying the plaintiff recovery' the joint deposit by the donor in his name and in the name of the donee, was valid to pass *causa*

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56. *Id.*

57. W. VA. CODE § 31-8-23 (superseded in essentially the same form by W. VA. CODE § 31A-4-33 (Repl. Vol. 1988)).

58. *Dorsey v. Short*, 157 W. Va. 866, 205 S.E.2d 687 (1974).

59. *Id.* at 869, 205 S.E.2d at 689.

*mortis* any remaining funds to the surviving donee.”<sup>60</sup> While the court in *Dorsey* was attempting to follow the conceptual basis of the *Lett* decision, its word selection and use of terminology associated with gifts sowed the seeds for subsequent confusion. For example, the *Dorsey* court expressly stated that the controversy “cannot be determined under the common law rules relating to gifts but must be resolved under the provision of the Code of West Virginia 1931, Chapter 31A, Article 4, Section 33, as amended.”<sup>61</sup> Note that the court appeared to pass “*causa mortis*”<sup>62</sup> any remaining “funds” while using the terms “donor” and “donee.” Neither the term nor the concept of a *causa mortis* passing is found in the *Lett* decision, and, other than in the quote referenced, is not discussed or explained in *Dorsey v. Short*. If the court’s reference in *Dorsey* was, as is most likely, to the language in *Lett* that stated “*upon the death of Delania Wilson, the entire amount of the deposit and the accrued interest passed to Prudence Lett under the provisions of the statute,*”<sup>63</sup> then the *Dorsey* court’s decision to refer to this as *causa mortis* was unfortunate. This apparent misstatement in the text of the opinion is further complicated by the language in the court’s second syllabus point:

Code, 1931, 31A-4-33 as amended, creates, in the absence of fraud, mistake or other equally serious fault, a conclusive presumption that the donor depositor of a joint and survivorship bank account intended a *causa mortis gift* of the proceeds remaining in the account after his death to the surviving joint tenant (emphasis added).<sup>64</sup>

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60. *Id.* at 871, 205 S.E.2d at 690 (emphasis added).

61. *Id.* at 869, 205 S.E.2d at 689.

62. “*Causa mortis*” is defined as “[i]n contemplation of approaching death.” BLACK’S LAW DICTIONARY 200 (5th ed. 1979).

63. *Lett*, 138 W. Va. at 762, 77 S.E.2d at 815 (emphasis added).

64. *Dorsey*, 157 W. Va. at 867, 205 S.E.2d at 688. In *Grace v. Klein*, 150 W. Va. 513, 147 S.E.2d 288 (1966), the court had explained *causa mortis* gifts thus:

Only personal property may be transferred by such gift. The donor must make the gift in contemplation of death, either in his last illness or while he is in other imminent peril; he must give up all dominion and control over the subject of the gift so that it may belong to the donee presently, as his own property; the donor must make an actual delivery of the thing given or a delivery of the means of getting immediate possession and enjoyment of the gift. A gift *causa mortis* may be revoked by the donor during his lifetime.

*Grace*, 150 W. Va. at 517, 147 S.E.2d at 291 (citation omitted). There was no evidence or suggestion in *Dorsey* that the depositor was in her last illness or other imminent peril.



As noted above, this syllabus point goes beyond the text of the opinion in *Lett*, is inconsistent with the conceptual basis of the *Lett* decision, and is contrary to the court's own pronouncement in *Dorsey* that "[w]e do not think that any question of gift or trust arises in determining the rights of the parties under the contract of the deposit."<sup>65</sup>

Thus, while the court in *Dorsey* relied upon the language in *Lett*, which recognized there may be some reason for holding that the nondepository party may not be entitled to the money and remanded the case for further proceedings, the introduction of the *causa mortis* gift terminology confused the doctrinal basis of the holding. Further, there is nothing in *Dorsey* to indicate or suggest that it was the court's intent to overturn the legal basis of the *Lett* decision.

A year after the *Dorsey* case, the court in *Wilkes v. Summerfield*<sup>66</sup> cited the second syllabus point of *Dorsey* as stating the applicable principle of law to resolve the issue of whether funds in a joint savings account become the sole property of the surviving joint tenant upon the death of the depositor. The court said that the deceased tenant's check deposited in the joint account *after* her death did not belong to the surviving tenant.<sup>67</sup> In effect § 31A-4-33 was held not applicable to such a deposit.

The court next considered this statute in *Farrar v. Young*,<sup>68</sup> which involved a family squabble among two brothers and a sister over the settlement of their father's estate. One of the deceased father's assets was a joint savings account created by the father which named his daughter as joint tenant. In recognizing the daughter's right to the balance in the account at her father's death, the court again relied on the second syllabus point in *Dorsey*.<sup>69</sup> While the decisions in *Wilkes* and *Farrar* relied upon *Dorsey* to dispose of relatively simply factual issues, the decisions strengthened the perception that *Dorsey* correctly set forth the doctrinal basis of the law.

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65. *Dorsey*, 157 W. Va. at 871, 205 S.E.2d at 690 (quoting *Lett*, 138 W. Va. at 759, 764, 77 S.E.2d 813, 815-16).

66. *Wilkes v. Summerfield*, 158 W. Va. 554, 212 S.E.2d 316 (1975).

67. *Id.* at 556, 212 S.E.2d at 318.

68. *Farrar v. Young*, 159 W. Va. 853, 230 S.E.2d 261 (1976).

69. *Id.* at 862, 230 S.E.2d at 266.

The next major development of the subject area was in *Kanawha Valley Bank v. Friend*,<sup>70</sup> where the court was presented with the question of the effect of a fiduciary relationship upon a transfer of money into a joint banking account with the right of survivorship. The case developed when an individual who held a power of attorney from Mr. Judy transferred Mr. Judy's money into a joint account in both his name and Mr. Judy's name.<sup>71</sup> In reference to the second syllabus point of *Dorsey*, the court in *Kanawha Valley Bank* stated,

*Dorsey* also created a conclusive presumption of a *causa mortis* gift by the donor in the absence of certain circumstances [fraud, mistake or other equally serious fault] . . . Here we deal with the question of constructive fraud which, if found, vitiates the presumption of a *causa mortis* gift under *Dorsey*.<sup>72</sup>

On appeal, the court reversed the trial court's entry of summary judgment granting the fund to Mr. Dunbar, the individual who held the power of attorney. In the reversal of the trial court, the court recognized that in certain instances a presumption of constructive fraud may arise in connection with joint bank accounts with survivorship if the parties to the joint account occupy a fiduciary or confidential relationship. Once this relationship is found to exist, the burden of proof shifts to the person who benefits from the creation of this account to show that it was in fact a *bona fide* gift.<sup>73</sup> Thus, while the *Kanawha Valley Bank* case specifically defines "one of the reasons" for denying the survivors the funds in the account alluded to in the *Lett* decision,<sup>74</sup> it reinforces the perception that the second syllabus point in *Dorsey* correctly states the relevant law and does not examine the dichotomy between the reasoning in *Lett* and the apparent holding of its progeny, *Dorsey*.

The fact that the fiduciary relationship discussed in *Kanawha Valley Bank* will not be construed to include friendship or opportunity to influence is illustrated by the decision in *Smith v. Smith*.<sup>75</sup>

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70. *Kanawha Valley Bank v. Friend*, 162 W. Va. 925, 253 S.E.2d 528 (1979).

71. The individual who held the power of attorney was Mr. Judy's brother-in-law, business associate and friend. *Id.* at 926, 253 S.E.2d at 529.

72. *Id.* at 927, 253 S.E.2d at 529-30.

73. *Id.* at 931, 253 S.E.2d at 531.

74. See *Lett*, 138 W. Va. at 762, 77 S.E.2d at 815.

75. *Smith v. Smith*, 168 W. Va. 511, 285 S.E.2d 145 (1981).

In that case the plaintiff had befriended Mrs. Price and during her lifetime "had performed a number of services for her such as doing laundry and driving her from place to place."<sup>76</sup> There was some evidence in the record that plaintiff's name was placed on the account to afford her access to the funds in the event that Mrs. Price got sick and that Mrs. Price had considered removing the plaintiff's name from the account.

The Supreme Court of Appeals reversed and held that the trial court erred in considering the relationship between Mrs. Price and the plaintiff a fiduciary relationship, which required the plaintiff to rebut the presumption of a constructive fraud and to prove that Mrs. Price had intended the funds in the account to be a gift to the plaintiff. In distinguishing the facts in *Smith* from *Kanawha Valley Bank*, the court placed considerable emphasis on the fact that it was through the use of the power of attorney that the joint tenant gained control of the assets placed into the bank account which would benefit the joint tenant as an individual.<sup>77</sup>

In the recent decision of *Vercellotti v. Bowen*,<sup>78</sup> the court was presented with a factual situation unlike that found in either *Kanawha Valley Bank* or *Smith*. The accounts in question were in the name of an elderly mother and her daughter who resided with her. On appeal, the court affirmed the jury's verdict that the executor of the mother's estate, and not the daughter, was the owner of the funds.

The court noted that the *Kanawha Valley Bank* decision was not limited to a relationship involving a power of attorney and that in the case before it, there was sufficient evidence of a confidential relationship between the decedent and the daughter to justify the application of the constructive fraud concept developed in the *Kanawha Valley Bank* case. More particularly, the court noted the mother's advanced age, her failing eyesight because of cataracts, her limited ability in the English language, her limited excursions from her home in the last years of her life, and her reliance upon her

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76. *Id.* at 512, 285 S.E.2d at 146.

77. *Id.* at 514, 285 S.E.2d at 147.

78. *Vercellotti v. Bowen*, 371 S.E.2d 371 (W. Va. 1988).

daughter and the daughter's husband for paying her bills and doing her banking. Whereas the court's emphasis in *Kanawha Valley Bank* was on the "fiduciary" aspect of the relationships, the *Vercellotti* decision relied upon the fact that a "confidential relationship existed between the decedent and the Bowens" and that the Bowens "exerted influence and control over the decedent's accounts for their benefit."<sup>79</sup> This *per curiam* decision broadens the application of the *Kanawha Valley Bank* principle and increases the number of situations in which constructive fraud may be found.

In the *per curiam* decision of *Simmons v. Simmons*,<sup>80</sup> the court relied upon the third syllabus point in *Dorsey*<sup>81</sup> to emphasize "that the establishment of this statutory joint tenancy can be conditional, and that 'if the conditions imposed on the joint deposit are not met, the donor may retain control and even complete ownership of the deposit during the donor's lifetime.'"<sup>82</sup>

In *Simmons*, the court noted that the withdrawal of the funds by the donor depositor does not conclusively rebut the presumption that the funds are jointly owned. Then, in the *per curiam* decision of *Waggy v. Waggy*,<sup>83</sup> the court recognized that the donor's intent is of central importance.<sup>84</sup>

While it is easy to read too much into *per curiam* decisions, the *Simmons* and *Waggy* cases appear to be more consistent with the rationale of the *Lett* decision (that the rights are determined by the contract of deposit) than with the literal reading of *Dorsey* (that the account represents a form of *causa mortis* gift).

79. *Id.* at 375.

80. *Simmons v. Simmons*, 298 S.E.2d 144 (W. Va. 1982).

81. "Prior to the death of a donor depositor, a rebuttable presumption exists under the provisions of Code, 1931, 31A-4-33, as amended, that the ownership of the funds is joint, a presumption which may be overcome by competent evidence." *Dorsey*, 157 W. Va. at 867, 205 S.E.2d at 688.

82. *Simmons*, 298 S.E.2d at 147 (quoting *Dorsey*, 157 W. Va. at 873, 205 S.E.2d at 687 [sic] [the proper citation for this quote is actually 205 S.E.2d at 691]).

83. *Waggy v. Waggy*, 301 S.E.2d 843 (W. Va. 1983).

84. The court in *Waggy* quotes a portion of the *Dorsey* decision which stated that "during the joint lives of the depositors, a person donating the funds may show that he did not intend to create a joint tenancy, notwithstanding the account is in joint form." *Dorsey*, 157 W. Va. at 872, 205 S.E.2d at 690-91. "The intention of the donor depositor is the key to the decision." *Waggy*, 301 S.E.2d at 845.

The court's difficulty in resolving a doctrinal basis for its decision is understandable. Professor Donald Kepner, who has written extensively on this subject,<sup>85</sup> in the introduction of one published article observed that "[T]he history of the development of the law of joint bank accounts is a story of courts trying to make this transaction fit into the accepted molds."<sup>86</sup> In addition to attempting to apply various common law principles which did not fit the transactions, Professor Kepner notes that in "[n]ot realizing the basic difference in the statutory law of other states, courts have followed cases based on entirely different types of legislation. The result is more confusion."<sup>87</sup> Professor Kepner concludes this article as follows:

Throughout this discussion there have been repeated references to the fact that the joint accounts do not fit into any of the common law categories for transferring property. The joint bank account does not qualify as a common law gift, because the donor does not surrender dominion. It is not a trust, because there is no intention on the part of the depositor to enter into such relationship. Neither is it a common law joint tenancy, because the four unities essential for creating this joint interest are lacking. While the parties may enter into a contract providing for the payment of the funds, the contract itself does not operate as a conveyance of the funds from one joint payee to the other joint payee. It is not a will, because it does not comply with the statutory formalities.

The joint and survivorship bank account transaction is a combination of all of the methods of transferring property listed in the preceding paragraphs. It partakes of the nature of a gift because it is gratuitous. It is like a will in that the beneficiary is not certain of the amount of the donation until the depositor's death. It is similar to a joint tenancy because of the creation of joint interests. It has some of the characteristics of a revocable trust. Since the joint account combines in part the features of gifts, wills, joint tenancies and revocable trusts it is a new concept possessing independent characteristics of its own. It should be recognized as such.<sup>88</sup>

In a second article on the subject,<sup>89</sup> Professor Kepner defined three stages through which the courts have evolved. The first stage

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85. Kepner, *The Joint and Survivorship Bank Account - A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953-54); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1958-59).

86. Kepner, *The Joint and Survivorship Account - A Concept Without a Name*, *supra* note 85, at 597.

87. *Id.* at 636.

88. *Id.* at 635-36.

89. Kepner, *Five More Years of the Joint Bank Account Muddle*, *supra* note 85.

involves the courts' refusal to accept the joint account transaction as an instrumentality for executing a gift, or, if the technique is recognized, the survivor's interest is determined on the basis of some common law concept. The second phase evolves after a number of cases have been decided by the courts, and the courts become less exacting in the technical requirements necessary for enforcing between the banks and the depositors the agreement which authorizes the payment to the survivor. Professor Kepner defined the third stage as

identified by judicial recognition that the joint bank account transaction is a new concept. This is accomplished by decisions which work out the requisites necessary to insure the enforcement of the right of survivorship, the creation of presumptions resulting from the act of opening a statutory joint account, the consequences of undue influence and fraud, and the rights of creditors of the depositors.<sup>90</sup>

It is interesting to compare West Virginia's cases with this analysis. The *Lett* decision was close to the realization that such accounts represented a new concept outside the law of gifts and trusts. The legacy of the *Dorsey* case is that it attempted to label the transaction with common law gift terminology. While the recent cases are now in the process of defining such matters as the consequences of undue influence or fraud, the cases continue to do so within the labels attached to the transaction in *Dorsey*. Professor Kepner's article cites a Virginia case and a Texas case which seem particularly appropriate. In the Virginia case the court said, "For more than half a century, the courts of this country have struggled to discover whether a joint deposit bank account with an extended right of survivorship, sometimes called a 'poor man's will,' is a gift, trust, a contract, or joint tenancy, or a testamentary disposition."<sup>91</sup> The Texas court, after noting the difficulty in the theoretical basis for such gift, said, "We do not indulge in a prolonged discussion of the academic. The agreement having validity must be enforced irrespective of the reasons sustaining it."<sup>92</sup>

While the theoretical basis of this "new concept" is perhaps of greatest interest to academia, the characteristic of the legal rela-

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90. *Id.* at 402-03.

91. *Id.* at 401, (quoting *King v. Merryman*, 196 Va. 844, 849, 86 S.E.2d 141, 143 (1955).

92. *Id.* at 402 (quoting *Adams v. Jours*, 258 S.W.2d 401, 403 (Tex. Civ. App. 1953)).

tionship now recognized by the West Virginia Supreme Court of Appeals becomes important to all of us. The clarity with which the court sets forth the rights, duties, responsibilities and obligations of the parties provides the guidance necessary to resolve future issues with a minimum amount of litigation.

#### IV. DIVORCE: DOES TITLE MATTER ANYMORE?

One of the interesting developments involving property rights over the past decade has been the evolution of a spouse's property rights when a marriage ends in divorce. An oversimplification of the evolutionary process is that the bright-line distinction between individual ownership and the various forms of concurrent ownership has blurred significantly and then culminated in equitable distribution.<sup>93</sup>

The West Virginia Supreme Court's redefinition of property rights began in *McKinney v. Kingdon*.<sup>94</sup> In *McKinney*, the issue was title to a 1977 Volkswagen Rabbit automobile which the court had ordered the former husband to transfer to his ex-wife. In a three to two decision, the majority held that "since titular ownership is a necessary compliment to lawful possession of an automobile, a spouse in a divorce action may be ordered to give to the other possession of an automobile and its title . . . ."<sup>95</sup> The decision of the majority was expressly "limited to automobiles, a unique kind of personal property, and is not intended to affect the existing law concerning real property or drastically alter the way personal property is currently disposed of in divorce actions."<sup>96</sup> However, the "limited holding" in *McKinney* was persuasive to the court's sense of equitable conscience in *Patterson v. Patterson*<sup>97</sup> where the court stated, "We see no reason why the court awarding a divorce cannot also impress

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93. *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983) (this holding was codified in 1984 in W. Va. Code § 48-2-32).

94. *McKinney v. Kingdon*, 162 W. Va. 319, 251 S.E.2d 216 (1978).

95. *Id.* at 327, 251 S.E.2d at 220.

96. *Id.* at 325, 251 S.E.2d at 219.

97. *Patterson v. Patterson*, 167 W. Va. 1, 277 S.E.2d 709 (1981), *overruled*, *LaRue v. LaRue*, 304 S.E.2d 312, (W. Va. 1983), *superseded* by statute as stated in *Butcher v. Butcher*, 357 S.E.2d 266 (W. Va. 1987).

a trust upon property when the spouse seeking the trust has contributed either money or service to the purchase of the property.”<sup>98</sup>

The husband in *Patterson* was the sole title holder of two parcels of land upon which he built and operated laundromats. When the Pattersons became divorced, the court held that a constructive trust could be impressed on the property held in the former husband's name for the benefit of his ex-spouse.<sup>99</sup> However, just as in *McKinney*, the court emphasized the limited scope of the holding.<sup>100</sup>

98. *Id.* at 3, 277 S.E.2d at 711. Immediately following this quote, the court reassured the reader by explaining:

At the outset it must be emphasized that our simple holding concerning joinder of claims does not convert West Virginia into a jurisdiction akin to a community property state. We have always followed the rule that in a divorce proceeding the circuit court does not have jurisdiction to transfer title to real property as a substitute for alimony or child support, or in addition to alimony and child support as equitable compensation for loss of the advantages of the marriage state. This is the general rule and will continue to be the law. We have held, however, in the case of *McKinney v. Kingdon* [citation omitted], that title to personal property such as automobiles which have a short useable life may be transferred since such a transfer is merely the equivalent of an award of alimony.

*Id.*

99. After considering the authorities we conclude that it is proper for a court to impress a constructive trust on the property of one spouse for the benefit of the other. However, before a party is entitled to such a trust he must: (1) overcome the presumption that there was a gift between the parties, and (2) show that he is otherwise entitled to the declaration of a constructive trust. As indicated above, the showing of entitlement to a constructive trust requires: (a) a showing that the party transferred to his spouse money, property, or services, which were actually used to procure property titled in the other spouse's name only and (b) that the transfer was induced by (i) fraud, (ii) duress, (iii) undue influence, (iv) mistake, (v) breach of implicit fiduciary duty, or (vi) that in light of the dissolution of the marriage the other spouse would be unjustly enriched by the transfer.

*Id.* at 12, 277 S.E.2d at 716.

100. We wish to point out as emphatically as possible that the property which the Circuit Court of Logan County impressed with a trust in favor of the wife was business property in which the wife had an interest because of her active, diligent, and regular participation in the business. All wives contribute to their husbands' business by providing a home, taking care of the children, entertaining business friends, and otherwise being supportive of the husband; however, these types of activities do not give rise to a claim against property which the husband has purchased with his own money, notwithstanding that he earned it with the help of the wife.

We distinguish business participation and domestic services because the law of domestic relations has developed the remedy of alimony for compensating a wife for her previous contribution to the family as wife, mother, and homemaker and for her loss of the advantages of the married state. Only when a wife (or husband) has contributed her (or his) own separate funds, either acquired during the marriage or before the marriage, or has contributed direct business services of a type which an employee or partner of



Two months after the *Patterson* decision, the court again recognized the appropriateness of a constructive trust in a divorce proceeding as to an individual's one-half interest in the marital domicile. The wife had conveyed the home to her husband under the mistaken belief that her interest in the property would be subject to the claim of her son's creditors.<sup>101</sup>

With the adoption of the equitable distribution statute in 1984, the court was expressly authorized to "direct either party to transfer their interest in specific property to the other party."<sup>102</sup> The effect of the statute was to provide a more direct remedy for resolving the inequities the court had identified in *Patterson* and *Purnell*. The philosophical drift of these decisions was summed up by the court in *Hamstead v. Hamstead*<sup>103</sup> when it said, "[O]ur new law of equitable distribution is less concerned with who 'owns' property at the time of divorce than it is with the property's origin."<sup>104</sup>

The cases arising under W. Va. Code § 48-3-10<sup>105</sup> illustrate this new concern with the property's origin and the diminished importance of title to the property. The prior law is illustrated by *Dodd v. Hinton*,<sup>106</sup> a case in which a man and woman each owned a house prior to their marriage to each other. Shortly after their marriage, they purchased a new residence as joint tenants with the

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the same sex would contribute, may a trial court impress the type of trust which we shall discuss below.

*Id.* at 4-5, 277 S.E.2d 712 (citations omitted) (footnote omitted).

101. *Purnell v. Purnell*, 167 W. Va. 715, 280 S.E.2d 281 (1981).

102. W. VA. CODE § 48-2-32(d)(7)(A) (Repl. Vol. 1986).

103. *Hamstead v. Hamstead*, 357 S.E.2d 216 (W. Va. 1987) *overruled*, *Roig v. Roig*, 364 S.E.2d 794 (W. Va. 1987).

104. *Hamstead* at 219.

105. Until amended in 1984, W. VA. CODE § 48-3-10 read:

Where one spouse purchases real or personal property and pays for the same, but takes title in the name of the other spouse, such transaction shall, in the absence of evidence of a contrary intention, be presumed to be a gift by the spouse so purchasing to the spouse in whose name the title is taken.

In 1984, the Legislature amended the section by adding:

Provided, that in case of an action under provisions of article two [§ 48-2-1 et seq.] of this chapter wherein the court is required to determine what property of the parties constitutes marital property and equitably divide the same, the presumption created by this section shall not apply, and a gift between the spouses must be affirmatively proved.

106. *Dodd v. Hinton*, 312 S.E.2d 293 (W. Va. 1984).

right of survivorship. A substantial loan was obtained to purchase this new residence and was represented by a demand note secured by a deed of trust. Approximately one year after the purchase of the new residence, the man sold the house he owned before the marriage and deposited the proceeds from this sale into a joint bank account. With these funds he paid off the loan on the new residence. Two months after he discharged this indebtedness, his wife filed for divorce. Although the parties agreed that the new residence should be sold and the proceeds divided, the ex-wife denied that she was responsible for any contribution to her ex-husband because of his payment of her share of the note obligation.<sup>107</sup> In a *per curiam* decision in favor of the ex-wife, the court relied upon W. Va. Code § 48-3-10<sup>108</sup> and prior law<sup>109</sup> to conclude that there was presumptively a gift to the wife of her interest in the property. The court also reasoned that although most of the funds in the joint account came from the proceeds of the sale of the husband's home, the money became the wife's property as well<sup>110</sup> when it was deposited in the parties' joint account.

In *Brewer v. Brewer*,<sup>111</sup> the court concluded that there was no presumption of gift under § 48-3-10 when a man, one day *before* his marriage, had a deed prepared naming himself and his betrothed as grantees with the right of survivorship. The couple separated less than one year later and the wife filed for divorce. The court held that since the parties were not married when the deed was delivered, the presumption of gift under the statute did not arise.<sup>112</sup> Since there was no presumption of gift under the statute,

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107. *Id.* at 294.

108. *Dodd* was decided on January 27, 1984. The West Virginia legislature amended § 48-3-10 in 1984. The provisions added by the Legislature are set forth in note 105, *supra*.

109. "[I]t is firmly established in our common law that where a husband furnishes the purchase money for property which is conveyed to him and his wife jointly, it is presumed that he intended one-half of the money paid and the half interest so conveyed to be a gift to his wife . . . ." *Dodd*, 312 S.E.2d at 295 (citing *Edwards v. Edwards*, 177 W. Va. 505, 185 S.E. 904(1936) (syl. pt. 2)).

110. *Dodd*, 312 S.E.2d at 296. As authority for this statement, the court relied upon W. Va. Code § 31A-4-33 as interpreted in the third syllabus point of *Dorsey v. Short*, 157 W. Va. 866, 205 S.E.2d 687 (1974), and *Simmons v. Simmons*, 298 S.E.2d 144 (W. Va. 1982). *Id.*

111. *Brewer v. Brewer*, 338 S.E.2d 229 (W. Va. 1985).

112. *Id.* at 232. In a footnote in the decision the court noted that the amendment to W. Va. Code § 48-3-10 occurred after this suit was instituted. *Id.*

the "wife" would have to prove the "husband" intended a gift to her of the one-half interest in the property.<sup>113</sup>

In a decision announced on the same day<sup>114</sup> as *Brewer v. Brewer*, the court in *Fischer v. Fischer*<sup>115</sup> overruled the trial court's holding that the proceeds from the sale of cattle purchased by Mrs. Fischer and raised by Mr. Fischer belonged to him.<sup>116</sup> While the court's characterization of the raising of the cattle as a joint enterprise produced a fair result on the facts of the case, the jurisprudential aspects of the decision are less than satisfactory. Although the court does not cite W. Va. Code § 48-3-10, it appears that the court's comment in footnote three<sup>117</sup> must have been made to rebut the presumption contained in that section of the Code. The apparent basis for the holding in *Fischer* is a portion of the *LaRue v. LaRue* decision, which held that a spouse who has made a material economic contribution toward the acquisition of property titled in the name of, or under the control of, the other spouse is entitled to claim an equitable interest in such property in a divorce proceeding.<sup>118</sup>

Without specifically addressing the issue or the statute, the court in *Fischer* appeared to suggest that equitable distribution redefined the role of W. Va. Code § 48-3-10 as it related to divorce proceedings. If in fact a new approach to the problems of ownership was suggested in *Fischer*, the approach appears to have been confirmed in *Hamstead v. Hamstead*,<sup>119</sup> where the *Hamstead* court stated the following:

Under W. Va. Code 48-2-1(e)(1) [1986], property and earnings acquired by either spouse during a marriage, except property specifically excluded by Code, 48-2-

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113. The trial court's decision that the wife was entitled to one half of the house was based solely on the presumption of gift under W. Va. Code § 48-3-10. Therefore, whether the wife may have a claim based on equitable contribution or as an adjunct to a claim for alimony or child support was not considered. *Id.* at 231.

114. December 17, 1985.

115. *Fischer v. Fischer*, 338 S.E.2d 233 (W. Va. 1985).

116. *Id.* at 235-36. Although it is not clear from the opinion, the court's discussion suggests that title to the cattle was taken in the name of Mr. Fischer. See Syllabus by the Court, the quote from *LaRue* and footnote 3. *Id.* at 234, 235-36.

117. *Id.* at 235 n.3.

118. *LaRue*, 304 S.E.2d at 312.

119. *Hamstead*, 357 S.E.2d at 216.

1(f) [1986] is 'marital property' for purposes of equitable distribution at the time of divorce. The fact that the assets have been acquired by one spouse and 'given' to the other spouse, does not alter the inclusion of these assets in the 'marital property' pool.<sup>120</sup>

Since the court did not discuss § 48-3-10 in either *Fischer* or *Hamstead*, the effect of those decisions on this statute was a matter of conjecture. The speculation ended ten months after the *Hamstead* case when the court in *Roig v. Roig*<sup>121</sup> addressed the question of the effect of § 48-3-10 on the new concern it had articulated in *Hamstead*:

Unfortunately, in *Hamstead* our attention was not directed to W. Va. Code, 48-3-10 [1984]. . . . Now that our attention has been directed to the express language of Code 48-3-10 [1984], we conclude that our holding in Syl. Pt. 2 of *Hamstead* is incorrect: it was obviously the intent of the legislature to allow one spouse to transfer property to the other spouse by irrevocable gift and thereby remove the assets so transferred from inclusion in the marital estate. However, in keeping with the spirit of Code 48-3-10 [1984], in order for property that is transferred from one spouse to the other during marriage to be excluded from the marital property pool, there must be proof that the property was intended as an irrevocable gift. In this regard, jewelry and fur coats are the type of gift that can almost be proven by circumstantial evidence; however, when real property, stocks, bonds, or other stores of family wealth are at stake, it requires considerably more than the simple fact that property was transferred from one spouse to the other to establish a qualified Code 48-2-1(f)(4) [1986] gift. In all instances, the burden of proof is upon the spouse who claims the gift.<sup>122</sup>

The rationale for the court decision in *Roig* is found in the *Patterson v. Patterson* decision:<sup>123</sup>

The court cannot be blind to the obvious fact that most married persons do not contemplate divorce throughout the entire course of a marriage, and that transfers of property between spouses is usually intended for the joint benefit of both. While we must retain the presumption of gift in order to avoid difficult third-party claims (since spouses usually do intend to confer the benefit of property on their other spouse in the event of their death), the presumption of gift is probably best rebutted in a suit between spouses by a clear showing of unjust enrichment. Most people do not intend unjustly to enrich the other man.<sup>124</sup>

120. See *id.* at 219.

121. *Roig v. Roig*, 364 S.E.2d 794 (W. Va. 1987).

122. See *id.* at 798.

123. *Patterson*, 167 W. Va. at 11-12, 277 S.E.2d at 716.

124. *Roig*, 364 S.E.2d at 798.

Given the court's holding in *Hamstead* that the emphasis is on whether the assets were acquired during marriage as opposed to who is the "title holder" of the assets, and the explanation in *Roig* that the presumption of § 48-3-10 is intended to apply to typical "gifts" but not to "real property, stocks, bonds or other stores of family wealth," the court will need to reconsider the role it has assigned to § 31A-4-33 in joint bank deposits.<sup>125</sup>

It is as Justice Neely said in *Hamstead*: "[O]ur new law of equitable distribution is less concerned with who owns property at the time of divorce than with the property's origin."<sup>126</sup> As the court noted in *Patterson*, the title continues to be important in order to "avoid difficult third party claims (since spouses usually do intend to confer the benefit of property on their other spouse in the event of their death)."<sup>127</sup> However, title ownership today is of little significance in divorce. Therefore, in cases where the marriage ends in divorce, the old presumption and assumption must be reexamined.

## V. WHO SAYS CRIME DOESN'T PAY?

Given the direction in which the West Virginia Supreme Court of Appeals moved during the 1980's in order to seek equitable solutions of property rights,<sup>128</sup> and particularly those property rights implicated when a marriage ends in a divorce,<sup>129</sup> the court's decision

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125. The provisions of W. VA. CODE § 48-2-32 were not previously available to the parties by virtue of W. VA. CODE § 48-2-36 (1986 Replacement Vol.) which provided that the 1984 amendments to the domestic relations laws were not 'applicable to actions filed under the provisions of this article in which, prior to the effective date [June 8, 1984] of such amendments the taking of evidence has been completed and the case has been submitted for decision.' Since this case is being resubmitted for decision on remand, however, the parties may now avail themselves of the provision of the equitable distribution statute. . . .

McComis v. McComis, 358 S.E.2d 217, 221-22 n.2 (W. Va. 1987).

126. *Hamstead*, 357 S.E.2d at 219.

127. *Patterson*, 167 W. Va. at 11, 277 S.E.2d at 716.

128. The court recognized "equitable modification" of a will so a provision would not violate the Rule Against Perpetuities in *Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262 S.E.2d 766 (1980); see generally Note, *Perpetuities Reform in West Virginia: Berry v. Union National Bank*, 11 REAL EST. L.J. 116 (1982); and the doctrine of "equitable adoption" in *Wheeling Dollar Sav. & Trust Co. v. Singer*, 162 W. Va. 502, 250 S.E.2d 369 (1979); and in *First Nat'l Bank in Fairmont v. Phillips*, 344 S.E.2d 201 (W. Va. 1985).

129. *Patterson*, 167 W. Va. 1, 277 S.E.2d 709 (constructive trust imposed); *LaRue*, 304 S.E.2d 312 ("equitable distribution").

in *Miller v. Sencindiver*<sup>130</sup> to permit the wife to take property through joint tenancy is especially difficult to understand. The issue in *Miller* was whether a wife who had killed her husband should be permitted to claim the entire ownership of the real estate that had originally been conveyed to her and her husband as joint tenants with the right of survivorship. The wife had been indicted for murder but had pled guilty to the lesser included offense of involuntary manslaughter.<sup>131</sup> This issue, while one of first impression in West Virginia, was not at all unique as reflected by the extensive listing in the *Miller* decision of reported cases in other jurisdictions.<sup>132</sup> In addition, the underlying issue of whether one criminally responsible for the death of another should be allowed to profit from his or her own wrongful act had been addressed both by the court<sup>133</sup> and the Legislature in West Virginia,<sup>134</sup> with the result being a clear expression of public policy. It is against this backdrop that the court decided *Miller v. Sencindiver*.

Court decisions which have precluded the slayer from profiting from the killing fall into three general categories: 1) those that deprive the killer of all portion of the tenancy; 2) those that view the death-causing act as a severance of the estate into a tenancy in common; and 3) those that impose a constructive trust upon the survivor to prevent the wrongdoer from profiting from the wrongful act.<sup>135</sup>

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130. *Miller v. Sencindiver*, 166 W. Va. 355, 275 S.E.2d 10 (1980).

131. *Id.* at 355, 275 S.E.2d at 11.

132. *Id.* at 357 n.2, 275 S.E.2d at 12, n.2.

133. *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E.188 (1934); *Johnston v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 100 S.E. 865 (1919).

134. No person who has been convicted of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest therein, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy or certificate of insurance, or otherwise; but the money or the property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the one killed or conspired against, unless by some rule of law or equity the money or the property would pass to some other person or persons.

W. VA. CODE § 42-4-2 (Repl. Vol. 1982).

135. It is not the purpose of this article to analyze these different theories. Within the *Miller* decision the court recognized all three categories and cited authority for each. *Miller*, 166 W. Va.

In addition to this substantial authority from other jurisdictions which deprives the slayer from benefiting from the wrongful act, the West Virginia Supreme Court had unequivocally stated its aversion to permitting a murderer from profiting from his/her own wrongful act. Denying the wife who was named as the beneficiary under a life insurance policy the right to recover upon the death of her husband whom she had murdered, the court in *Johnston v. Metropolitan Life Insurance Co.*<sup>136</sup> said the following:

It would be monstrous for the courts to lend their aid to anyone for the purpose of enriching himself by the commission of murder, and to entertain suit on behalf of the beneficiary to recover upon this policy of insurance would be doing that very thing. It is against the policy of our law to reward one for the commission of crime, and whenever the effect of the enforcement of a right which one would otherwise have would be to give him an advantage by reason of his felonious act, the courts will decline to entertain it.<sup>137</sup>

The breadth as well as the depth of the policy articulated in *Johnston* is illustrated by the court in *Metropolitan Life Insurance Company v. Hill*.<sup>138</sup> In *Hill*, the court held the principle was not limited to murder but applied to any unlawful intentional causation of death, whether felonious or not:

The *Johnston* opinion displays no intention to limit the test to *murder* in a technical sense. The basis of the opinion is the fundamental principle of justice that *one shall not profit by his own wrong*. The opinion says: "It is against the policy of our laws to reward one for the commission of crime." That policy no more rewards an intentional misdemeanor than a felon. The one differs at law from the other simply in degree. Both set the law at naught. "The law does force its ministers of justice to abet a criminal design to set the law at naught."<sup>139</sup>

The court's explanation of W. Va. Code § 42-4-2, enacted after the *Johnston* decision, is of importance given the court's reading of this statute in *Miller*.

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at 360-61, 275 S.E.2d at 14. Within various jurisdictions, cases may involve both tenancies by entirety as well as joint tenancy, and there may be statutes of varying degree of applicability. For general analysis of these theories see Youdan, *Acquisition of Property by Killing*, 89 LAW Q. REV. 235 (1973); Recent Decisions, *Descent and Distribution Joint Ownership Imposition of Construction Trust on Murderer of Co-Tenant*, 56 MICH. L. REV. 1200 (1958).

136. *Johnston*, 85 W. Va. at 70, 100 S.E. at 865.

137. *Id.* at 72, 100 S.E. at 866.

138. *Hill*, 115 W. Va. at 515, 177 S.E. at 188.

139. *Id.* at 518, 177 S.E. at 189 (emphasis in original) (citations omitted).

In *Miller*, the court concluded that the statutory phrase “or otherwise”<sup>140</sup> did not apply to a survivorship created in a deed pursuant to § 36-1-20, therefore, § 42-4-2 was inapplicable. In *Hill*, the court explained that the statute was enacted to provide for the disposition of the proceeds denied to the wrongdoer:

The effect of the Johnston decision was to leave the proceeds of the policy with the insurance company. The statute, in so far as it inhibits the murderer from securing the proceeds is merely declarative of the Johnston decision, and does not *meet* a situation like the one presented here. The situation is met only by the disposition which the statute makes of the insurance from which the slayer is thus barred. It is therefore obvious that the major purpose of the Revisers [of the 1931 Code] was to arrange disposition.<sup>141</sup>

The proximity in time of the court’s decision to the enactment of this provision gives additional credence to those who would argue that the court’s interpretation of the statute in *Miller* was unduly restrictive.

However, even if one accepts that the statute is not applicable to the survivorship rights created in a deed pursuant to W. Va. Code § 36-1-20, the decision in *Miller* is inconsistent with the court’s willingness to look beyond a title instrument to the equities involved. As discussed above, it was only a matter of months<sup>142</sup> before the court recognized the constructive trust in *Patterson*. It seems inconceivable to suggest that the equities which the court recognized in *Patterson*, requiring the husband’s legal title to be subject to the constructive trust in favor of his wife, would not be *at least* as applicable to the ownership the wife acquired in *Miller* by killing her husband. Certainly the killing of one’s spouse is as reprehensible as “fraud, duress, undue influence, mistake, or breach of implicit fiduciary duty,”<sup>143</sup> which are cited as reasons for imposing a constructive trust in *Patterson*.

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140. Under W. Va. Code § 42-4-2 the statutory prohibition applies to “any money or property, real or personal, or interest therein, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy or certificate of insurance *or otherwise*.” *Id.* (emphasis added).

141. *Hill*, 115 W. Va. at 518-19, 177 S.E. at 189.

142. *Miller v. Sencindiver* was decided on Dec. 19, 1980 and a rehearing was denied Feb. 25, 1981. *Patterson v. Patterson* was decided on May 5, 1981.

143. *Patterson*, 167 W. Va. at 12, 277 S.E.2d at 716.



While it is hoped the Legislature accepts the invitation extended to it in *Miller* to address the issue, it is submitted that even if the Legislature does not act, then in light of the *Patterson* decision, there is ample reason for the court to reconsider the decision in *Miller* and to align itself with those states that impose a constructive trust upon the title acquired by the slayer. This would prevent unjust enrichment by the wrongful act.<sup>144</sup> If the West Virginia Supreme Court of Appeals adopted the imposition of a constructive trust in such cases, it could apply the same principle it uses in resolving the question of equitable distribution to determine the distribution of the assets held subject to the constructive trust.

Footnote five of the *Miller* case suggests, with limited discussion, that a decision contrary to *Miller* might violate "a constitutional prohibition against forfeiture of estate by criminal conviction."<sup>145</sup> Since this "concern" is not discussed other than in the footnote, it is not possible to tell what role it played in the court's decision. However, the suggestion that this constitutional provision may require that the slayer be permitted to take the property appears to be without merit.<sup>146</sup> In the matter of the *Estate of Shields*<sup>147</sup> the question before the court was whether a wife who had killed her husband should be allowed to keep one half of the property or lose all interest in jointly held property to the children of their marriage. Reaffirming a decision which held that the murder severed the survivorship of the joint tenancy and left the parties as tenants in common, the court raised the issue of whether a provision in the Kansas Constitution, similar to the one in the West Virginia Constitution, would prevent the wife's forfeiture of her "one half interest."<sup>148</sup> Judge McFarland, who believed the wife

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144. For a list of the states, see *Miller*, 166 W. Va. at 360-61, 275 S.E.2d at 14. One of the early advocates of the constructive trust as the solution for preventing the slayer from profiting from the wrongful act within recognized principles of property law was Dean James Ban Ames of the Harvard Law School. See J. AMES, LECTURES ON LEGAL HISTORY 310 (1913).

145. *Miller*, 166 W. Va. at 361 n.5, 275 S.E.2d at 14, n.5 (quoting W. VA. CONST. art. III, § 18 ("No conviction shall work corruption of blood or forfeiture of estate.")).

146. A brief discussion of common law rules which gave rise to such provision is found in 1 MINOR ON REAL PROPERTY §§ 161,162 (Ribble ed. 1928).

147. *In re Estate of Shields*, 224 Kan. 604, 584 P.2d 139 (1978).

148. *Id.* at 604-05, 584 P.2d at 140.

should take no interest in the jointly held property, in a well-reasoned dissent addressed the issue of "forfeiture of estate." After discussing the evolution of the common law doctrines and their application to the United States, he noted that "[t]he majority opinion confuses forfeiture to the government with forfeiture between private individuals in civil proceedings. The case before us is a civil action and the abolition of forfeiture of estate contained in the Bill of Rights is wholly inapplicable."<sup>149</sup> While the dissent in the *Shields* case must be read in light of the earlier Kansas decisions, Judge McFarland's discussion of the origins and abolition of the "corruption of blood and forfeiture of estate" aspects of attainders is enlightening.<sup>150</sup>

In the New Jersey case of *Neiman v. Hurft*,<sup>151</sup> the court responded as follows to an argument that the husband could not be divested of title he acquired through survivorship when he murdered his wife:

This doctrine [applying the equitable doctrine of a constructive trust] is so consistent with the equitable principles that have obtained here for centuries that we have no hesitancy in applying it, and we find no merit at all in the defendant's argument that the decision below works a corruption of blood or a forfeiture of estate. It would be a strange system of jurisprudence that would be able to grant relief against many kinds of accidents, mistake and fraud, by compelling a defendant to act as constructive trustee with respect to property vouchsafed him by the common law, and yet be unable similarly to touch the legal rights of a defendant who sought to profit by a heinous crime.<sup>152</sup>

In *Sikora v. Sikora*,<sup>153</sup> the Montana court had little difficulty in disposing of a similar argument that the imposition of a constructive trust violated Montana's statutory and constitutional provisions pertaining to forfeiture of estates for conviction of a crime. In so holding it quoted with approval the *Neiman v. Hurft* decision.<sup>154</sup>

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149. *Id.* at 609, 584 P.2d at 143.

150. *Id.* at 606-09, 584 P.2d at 141-43. In tracing the historical development of forfeiture, Judge McFarland relied upon Professor Alison Reppy's article *The Slayer's Bounty History of Problem in Anglo-American Law*, 19 N.Y.U.L.Q. REV. 229 (1942).

151. *Neiman v. Hurft*, 11 N.J. 55, 93 A.2d 345 (1952).

152. *Id.* at 61, 93 A.2d at 347.

153. *Sikora v. Sikora*, 160 Mont. 27, 499 P.2d 808 (1972).

154. *Id.* at 32, 499 P.2d at 811.

In addition to Judge McFarland's argument that forfeiture of estates is not applicable to such civil issues, and the decisions of sister states which find no conflict with the imposition of constructive trust and statutory and/or constitutional provisions against forfeiture, the cases cited under the West Virginia constitutional provision do not suggest that forfeiture has any applicability to this type of problem.

The issue in the case of *Martin v. Long*<sup>155</sup> was whether the defendant could avoid his obligation under a contract he had entered into with the plaintiff for the cutting and hauling of timber. The defendant claimed he was not obligated to pay for the services performed by the plaintiff because at the time he entered into the contract his conviction of second degree murder was on appeal. In effect, the defendant claimed that because of his conviction he did not have the capacity to enter into a binding contract. The court held inapplicable the common law doctrine which states that one convicted of a felony is civilly dead. The second issue in the *Martin* case was whether it was appropriate for the county court to appoint a committee prior to the time the defendant actually began to serve the imposed sentence.

In *Moss v. Hyer*,<sup>156</sup> the issue was whether the plaintiff, an ex-convict, could maintain an action for personal injury resulting from defendant's negligence and sustained while the plaintiff was a convict. Again the court said that the convict was not civilly dead and held that "there is no period of time in the life of any person when a personal wrong may be inflicted upon him without there being attendant civil liability upon the wrongdoer."<sup>157</sup>

The issue before the court in *State v. McAboy*<sup>158</sup> was whether a defendant's credibility in a criminal trial could be impeached by questioning him as to a prior felony conviction. In a holding which

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155. *Martin v. Long*, 92 W. Va. 624, 115 S.E. 791 (1923).

156. *Moss v. Hyer*, 114 W. Va. 584, 172 S.E. 795 (1934).

157. *Id.* at 590, 172 S.E. at 797.

158. *State v. McAboy*, 160 W. Va. 497, 236 S.E.2d 431 (1977), *overruled* on other grounds by *State v. Kopa*, 311 S.E.2d 472 (W. Va. 1983), *modified*, *State v. Clements*, 334 S.E.2d 600 (W. Va. 1985).

restricted the use of prior conviction for impeachment purposes, the reference to article III section 13 of the West Virginia Constitution was that just as attainders no longer have a place in modern society neither does the rule that a defendant can be impeached through evidence of prior convictions. The court explained the use of prior convictions for impeachment:

[Impeachment] [s]tands as one of the last vestiges of the common law harshness that denied the accused the right to testify in his own behalf. A rule which dictated that once a person is convicted of a felony, he was forever barred from giving testimony. A system that conceived the doctrine of attainder.<sup>159</sup>

In *State v. Konchesky*,<sup>160</sup> the issue was whether a person who attempted to bribe a witness was entitled to return of the bribery money which had been turned over to the state. The court held that the refusal to return the money to the defendant *did* violate the constitutional prohibition against forfeiture of estate. In *Craig v. Marshall*,<sup>161</sup> the issue was whether a prisoner may file a suit in his own name, as distinguished from a suit filed by a committee appointed pursuant to W. Va. Code § 28-5-33 or a “next friend” as provided by Rule 17(c) of the West Virginia Rules of Civil Procedure. In concluding that the prisoner may sue in his own name, the court explained part of the reason for its decision: “[W]e have always recognized that a prisoner does not lose his civil rights by virtue of a criminal conviction.”<sup>162</sup>

Finally, if the *Miller* decision is accepted at face value, it suggests an internal inconsistency. If article III, section 18 of the West Virginia Constitution were in fact applicable to the “Miller type case,” then W. Va. Code § 42-4-2 would itself be constitutionally infirm, and the suggestion that the Legislature should address the issue would be an invitation to enact an unconstitutional provision. In addition, the court’s suggestion that it had the power to issue equitable remedies, but instead elected to defer to the Legislature,

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159. *Id.* at 507, 236 S.E.2d at 436.

160. *State v. Konchesky*, 166 W. Va. 57, 272 S.E.2d 452 (1980).

161. *Craig v. Marshall*, 331 S.E.2d 510 (W. Va. 1985).

162. *Id.* at 513 (citing *Martin v. Long*, 92 W. Va. 624, 115 S.E. 791 (1923); W. VA. CONST. art. III, § 18).

would be inconsistent with a constitutional mandate to protect the "slayer's rights."<sup>163</sup>

Given the 1981 legislative amendment to W. Va. Code § 36-1-20, which added subsection 1(b),<sup>164</sup> the number of cases in which survivorship is created pursuant to this statutory provision will undoubtedly increase and the relationship between §§ 42-4-2 and 36-1-20 will more likely come into conflict.<sup>165</sup>

## VI. CONCLUSION

Joint tenancy in West Virginia now means one thing if it exists between husband and wife and something different if the tenants are not married to each other. With the exception of the *Miller* case, the past two decades have been marked by the court's willingness to look beyond instruments of title to the equities between the husband and wife. While the majority of the cases involving the balancing of the equities have arisen as a result of divorce, the same concerns have been evident in the suits involving the partition of real property by creditors of one of the spouses. Finally, while the cases discussed above principally involve divorces, the court's willingness to venture into "equitable resolution" of property rights at the time of death has been suggested in *Davis v. K.B. & T. Co.*<sup>166</sup> In *Davis*, the court considered the effect of an inter vivos trust established by a husband upon his wife's rights in his property at his death. In upholding the inter vivos trust upon facts which established the husband's concern for his wife's well-being, the court

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163. In *Miller* the court said,

And although some courts have held that killing destroys statutorily created survivorship in joint tenancy, we prefer that the Legislature decide the matter, considering that this particular estate is its creation, and interposition of equitable doctrines applicable to common law entitlements in real property, although possible, seems to us not appropriate.

*Miller*, 166 W. Va. at 361-62, 275 S.E.2d at 14 (citations omitted).

164. When the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive "or" such ownership shall be held as joint tenants with right of survivorship, unless expressly stated otherwise. W. VA. CODE § 36-1-20(b) (Repl. Vol. 1986).

165. Among items often titled in this manner are automobiles, corporate securities, safety deposit boxes, and U.S. Savings bonds. See generally Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970).

166. *Davis v. KB&T Co.*, 309 S.E.2d 45 (W. Va. 1983).

said, “[W]e believe the better course is to adopt a flexible standard which takes into account all of the circumstances and weighs the equities on each side.”<sup>167</sup> The course of action suggested by this quote is not without cost to our society because, until adequate guidelines are developed to replace the old rules for resolving property rights, litigation will usually be necessary to resolve the weighing of equities. As the court ventures down the road, hopefully it will develop the new guiding principles with as much clarity and precision as possible, thus ensuring that as much guidance as possible is provided to the lawyer who must answer a client’s questions.

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167. *See id.* at 50.

